No. 10,962

United States Circuit Court of Appeals

For the Ninth Circuit

THE RAILROAD CREDIT CORPORATION, a corporation,

Appellant,

vs.

FREDERICK H. ECKER, FRANK C. WRIGHT and ROBERT E. COULSON, the members of the Reorganization Committee of The Western Pacific Railroad Company, Debtor,

Appellees,

and

THE WESTERN PACIFIC RAILROAD CORPORATION, a corporation,

Appellant,

vs.

THE RAILROAD CREDIT CORPORATION, a corporation,

Appellee.

Closing Brief of The Railroad Credit Corporation As Appellant Upon Its Appeal

ARTHUR B. DUNNE
333 Montgomery Street,
San Francisco 4, California,
Attorney for Appellant,
The Railroad Credit Corporation

EDWARD G. BUCKLAND,
WILLIAM J. KANE,
Of Counsel

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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We shall have occasion to refer to our Opening Brief on this appeal and will do so as "Op. Br." We shall also have occasion to refer to the "Reply Brief of The Railroad Credit Corporation as Appellee on the Appeals of The Western Pacific Railroad Corporation" in Nos. 10,962 and 10,966, and will do so as "Rep. Br." For this reason, a copy of our Reply Brief was served on the Reorganization Committee, although it professes

not to be interested in the appeals of The Western Pacific Railroad Corporation. The brief on behalf of the members of the Reorganization Committee as appellees on appeal of The Railroad Credit Corporation we will refer to as "Com. Br." Record references will be made as in our Opening Brief and Reply Brief. All emphasis by boldface type is ours.

We note the following corrections to be made in our Opening Brief:

Insert "or" before "on" in the first line of the matter indexed in the subject index for page 20.

Page 4, third line up from the bottom of the text, substitute "205" for "77" in the references to the sections in 11 U.S.C.A.

Page 20, second line from the top, strike out the word "was."

Page 24, citation to the second quotation, after "498" strike out "4 col."

Page 47, eighth line from the bottom, substitute "word" for "work."

Page 53, note 40, substitute "$1,217.89" for "$1,221.89" and "$27,309.61" for "$27,313.61" (see Rep. Br. p. 45, n. 46, par. 2).

I. THE FACTS

The attempt of the brief for the Reorganization Committee to deal with the facts calls for little comment. The efforts consist principally of reprinting matter which we have set out. Nothing new is added. No corrections or criticisms are suggested. The attempt is most significant for its admissions and omissions.

It is said that by December 1944, the Debtor's distributive share under the Marshaling and Distributing Plan, 1931, had increased to $27,094 (Com. Br. 2). This, of course, does not appear in the record. It may be true, but no concession is now made, because (1) counsel presenting this brief is not informed

of the fact,* and (2) if we are correct in our position on this appeal, it is not material.

It is said that the Plan of Reorganization was submitted to the creditors and acted upon by them favorably. This does not appear in the record. We make no point of that. It is the fact that The Railroad Credit Corporation joined in the favoring action in the way contemplated by §77 of the Bankruptcy Act.

It is noticed that in the Commission's original report it was provided that The Railroad Credit Corporation should release and surrender the Debtor's distributive share under the Marshaling and Distributing Plan, 1931, that The Railroad Credit Corporation objected to this provision, and, in response to its objection, the Commission modified its original report and substituted the provisions of the final Plan (Com. Br. 9, 10, and see Op. Br. 43-48). And then, "for reasons which are not at all clear" because, as the Reorganization Committee's brief points out, "the fairness of the plan" and whether it responds to applicable rules of law "are no longer open to question" (Com. Br. 7),—the conclusions of the Commission are now *"res judicata* and not open to question upon this appeal" (Com. Br.),—it is said that this change made by the Commission, in response to the objection of The Railroad Credit Corporation, was made "for reasons which are not at all clear" (Com. Br. 10). With deference, the reasons **are** clear. Facts which are not, and cannot, be disputed (Op. Br. 43-48; Com. Br. 9, 10) make it apparent that the change was made to bring the Plan into harmony with the full priority rule of the *Boyd Case* (Op. Br. 36-41), because, as to the Debtor's distributive share, The Railroad Credit Corporation was in the position of having a complete set-off,—we believe this is the proper analysis (Op. Br. 14—note 13, 16—note 15, 35, 36),—or a first lien.

It is worth digressing to point out again (see Op. Br. 42-48) that to give the Plan the construction the Committee now tries to support, is to ignore both the change in the Plan, made by

*After this brief was set up in type we were informed that another distribution was made on October 20, 1944, increasing the Debtor's distributive shares by $1,003.53 and to $27,095.25.

the Commission after mature reflection, and the reason for the change,—to treat the Plan just as though no objection or responsive change had been made. The Committee's Brief attempts to bypass this with shrewd silence. This is one of the brief's significant omissions.

It is suggested that the Plan, by permitting The Railroad Credit Corporation to participate and not "release or surrender any right or interest in the distributive shares of the Debtor or its subsidiary under the Marshaling and Distributive Plan, 1931" (Subd. R, Op. Br. 28), accorded to The Railroad Credit Corporation "a privilege not extended to any other secured creditor of the debtor" and that "no other secured creditor was permitted, under the terms of the plan, to retain any collateral pledged by the debtor" (Com. Br. 11). What was accorded to The Railroad Credit Corporation was no more than a proper recognition of its legal rights and it was given no treatment more favorable than that given to others similarly situated. The Marshaling and Distributing Plan, 1931, expressly provided "that any distributable amount inuring to a carrier indebted to the fund, instead of being paid to it, **shall be credited on its obligation"** (Op. Br. 14). Notice: **"shall be** credited," not "may be credited." The Debtor's notes authorized the payee to "appropriate and apply to the payment" of any debt due, whether existing or later contracted, "any and all property now or hereafter in the hands of the payee belonging to the Railroad Company" (Op. Br. 15, 16). What we had was not merely as good as cash (compare the position of the R.F.C. in *In re Chic. & N. W. Ry. Co.,* Op. Br. 37) it **was** cash. We had a prior, paramount and absolute right to utilize fully the Debtor's distributive share, in the very form in which it existed, by applying it directly against the debt. No other creditor was so situated. But there were creditors who had analogous positions and who were all given analogous treatment, adjusted to their positions. The treatment accorded to us may have been different in degree, but it was not different in kind from the full priority treatment accorded to the holders of equipment trust certificates, the Bald-

win lease and the Pullman contract (Op. Br. 37, 38). There is nothing here but a proper application of the full priority rule of the *Boyd Case.*

It is said that we were permitted to retain the Debtor's distributive share notwithstanding the injunction of August 2, 1935 (Com. Br. 11) and that we even assert "the special privilege of realizing on debtor's collateral in defiance of the District Court's restraining order of August 2, 1935" (Com. Br. 13). The suggestions hardly call for comment. The order did not restrain us from retaining the Debtor's distributive share. We are not seeking to sell, dispose or convert it. The restraining order did not apply to set-offs. Indeed, $150,829.12 has been applied in set-off and reduction of the Credit Corporation claim (59 separate distributions) without criticism or comment. (See Rep. Br. p. 4, note 2; Op. Br. pp. 7, 14, 16.) But the short of the whole matter is that if there is anything in the restraining order in conflict with any provision of the Plan, the restraining order was necessarily, to that extent, vacated by the order of the court confirming the Plan.

It is said that we even assert that we are "entitled to be treated as a senior creditor with full priority rights" although under the Plan we were treated as a junior creditor (Com. Br. 13). In a sense,—only a general and inaccurate sense,—we were a junior creditor when our total and over-all position was looked to. More properly, we were a junior creditor as to most of the Debtor's assets; but we were a senior creditor as to some,—the general and refunding mortgage bonds had a first and senior lien on certain of the Debtor's assets and The Railroad Credit Corporation, if the provisions of the Marshaling and Distributing Plan, 1931, and the Debtor's notes be considered as creating a pledge, had a first lien on, and was a senior creditor in respect of, the Debtor's distributive share.

At a number of places, the Committee's Brief undertakes to state what the Commission did **not** find. In so far as it is necessary to comment on such statements, it is done below. Here it is enough to say that we are relying upon what the Commis-

sion **did** find and **did** order, not upon its failure to find. Here it is enough to notice that, while the statements are literally true that the Commission did not make the findings suggested, the statements cannot be read with further implications. In those instances referred to in which the Commission did not make a finding, as suggested, **it made no finding at all,**—it did **not** find that the converse was true. The instances selected are instances of silence and no more.

II. THE ISSUE

The Committee's Brief states (p. 6) that on this appeal there is only one issue,—"the question of construction of certain provisions of the plan of reorganization." With this we agree. But with the further veiled suggestions, that in construing the Plan the setting in which it is found is to be disregarded, we do not agree. We deal with this below.

It is further said that the issues presented on the appeals of The Western Pacific Railroad Corporation do not involve any construction of the Plan (Com. Br. 6). This well may be so. But, if true, it means that the appeals of The Western Pacific Railroad Corporation present nothing, for, without such an issue, The Western Pacific Railroad Corporation was not before the court (Rep. Br. 51, 52). It is understandable why the Committee's Brief takes this position. It takes this position, because, to maintain its own, it finally has been forced to join hands with The Western Pacific Railroad Corporation and to claim,—carefully, it is true, guardedly,—that, although The Railroad Credit Corporation was not made whole in fact (The Western Pacific Railroad Corporation concedes this, the Reorganization Committee does not deny it), upon a construction of the Plan and in legal intendment,—by a fiction,—The Railroad Credit Corporation has been made whole. "Refunded" is the cautious and ambiguous word the Reorganization Committee uses. The only anamorphoscope needed is the Plan itself,—the whole Plan, not selected and dissected excerpts.

III. CONSIDERATION OF APPELLEE'S POINTS

The Committee's Brief notices that our Opening Brief set out somewhat fully the background of the Plan and its pertinent provisions. In this connection, and as part of the background against which the Plan stands, the full priority rule of the *Boyd Case* was stated. The Committee's Brief, with hardly a polite nod, turns its back on this with the comment that the Plan is now *res judicata* and its fairness is no longer open to question. The attempt is to create the impression that we are attacking the Plan.

There is no attack upon the validity of the Plan. Its validity is foreclosed. **But its meaning and construction are not.** To bring forward the considerations which bear upon the proper construction of the Plan is no attack upon it. "The mere construction of a decree involves no challenge of its validity" (*St. Louis etc. R. Co. v. Wabash R. Co.,* 217 U.S. 247, 250, 251, 54 L.ed. 752, 755, col. 1).

There is nothing peculiar to the construction of a decree. Ordinary rules of construction apply. It is to be construed just as "a contract or any other document" is to be construed (*Lazar v. Superior Court,* 16 C.2d 617, 622, 107 P.2d 249; *Permain Oil Co. v. Smith,* 129 Tex. 413, 107 S.W.2d 564, 567).[1] Two of the general rules of construction are of significance here.

In the construction of a decree, its language is limited to the matter then under consideration (*Vicksburg v. Henson,* 231 U.S. 259, 269, 58 L.ed. 209, 216).[2] (Cf. Rep. Br. 26)

The document is to be given a reasonable construction. This contemplates a construction which will not bring it into collision with established rules of law (*Robbins v. Pac. Eastern Corp.,* 8 C.2d 241, 272, 65 P.2d 42; *Restatement, Contracts,* §236(a)).

1. Accord: *Gough v. Jones,* 212 S.W. 943 (Tex. Com'n of Appeals); *Texas Co. v. Beall,* 3 S.W.2d 524 (Tex. Civ. App.); *Prince v. Frost-Johnson L. Co.,* 250 S.W. 785, 790 (Tex. Civ. App.).

2. At U.S. 273, L.ed. 218, the court also points out the settled rule that in the construction of a decree you cannot seize upon isolated and dissected parts, but that you must look to the whole and at what the whole was designed to accomplish.

> "The settled doctrine in the construction of a statute is to give it, if possible, a rendering which will make it valid rather than invalid. This is true also as to construction of an agreement. **The same salutary rule will be applied by this court when confronted with a judgment.** The court below is presumed to have decided correctly, until the contrary is shown."[3] (*Byrd v. Goodman,* 195 Ga. 621, 25 S.E. 2nd 34, 40, col. 2)

The most familiar statement of the rule, as it applies to judgments, is that in 1 *Black on Judgments,* §§3, 123, where, speaking of a judgment, it is said:

> "When it admits of two constructions, that one will be adopted which is consonant with the judgment that should have been rendered on the facts and law of the case."

This language from *Black* is taken from its quotation in *Watson v. Lawson,* 166 Cal. 235, 241, 135 P. 961,[4] and the court itself says (we omit supporting citations):

> "In applying a judgment, 'if the language be in any degree uncertain, we may properly refer to the circumstances surrounding the making of the order or judgment—to the condition of the cause in which it was entered.' A judgment 'must be construed with reference to the law regulating the rights of the parties.' "[4]

In *Manning v. Bank of Calif.,* 216 Cal. 629, 637, 15 P.2d 746, the court used language which has been used repeatedly, when it said that a suggestion made by counsel

> "is in accord with the rule as to judgments generally, that where a judgment admits of two constructions, that one will be adopted which is consonant with the judgment that should have been rendered on the facts and law."
>
> "Where a judgment is susceptible of two interpretations, it is the duty of the court to adopt the one which renders

3. Supporting citations have been omitted.

4. The *Watson Case* is quoted in *Prescott v. O'Connell,* 27 C.A.2d 220, 223, 80 P.2d 749; *Treece v. Treece,* 125 C.A. 726, 14 P.2d 95 (hr. den.); *Anderson v. State,* 54 Ariz. 387, 96 P.2d 281, and was followed in *Manning v. Bank of Calif.,* 216 Cal. 629, 637, 15 P.2d 746, and *In re Ferrigno,* 22 C.A.2d 472, 71 P.2d 329.

> it more reasonable, effective and conclusive in the light of the fact and the law of the case. A court's judgment must be read and interpreted in the light of what was before it, * * *" (*Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co.,* 137 F.2d 871, 885, bot. col. 1 (C.C.A. 6,—cert. den. 320 U.S. 800, 88 L.ed. 483, reh. den. 321 U.S. 803, 88 L.ed. 1089)).

The rule is too well settled to warrant further discussion. If further authorities are desired they are available.[5]

This is the reason for consideration of the full priority rule of the *Boyd Case* (Op. Br. 38-42). We do not attack the Plan or the order confirming it. But when the Reorganization Committee raises a question as to its meaning, if it is susceptible of a construction as urged by the Committee, different from that which is apparent on its face and different from that urged in our Opening Brief, then in determining what construction shall be given to it and the order confirming it, the background of the Plan must be looked to, the whole Plan itself must be looked to, the Plan must be harmonized with its background and the purpose it was intended to serve, it must be harmonized and made consistent with itself, and it must be given a construction which makes it consistent with the full priority rule of the *Boyd Case.*

The Committee's Brief (p. 12) states that "the provisions of paragraph 4 of subdivision P of the plan * * * require a reduction in the **claim** of the Railroad Credit Corporation by the amount of proceeds of such distributive share," quotes provisions

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5. *Byrd v. Goodman,* 195 Ga. 621, 25 S.E.2d 34, 40; *Chappell v. Small,* 194 Ga. 143, 20 S.E.2d 916, 920; *In re Summers,* 79 Ind. App. 108, 137 N.E. 291, 293 (applying the rule to an award under the workman's compensation act, noticing that while it was not a judgment, the same rule applied); *Louisiana etc. Co. v. Nuroff,* 139 La. 808, 72 So. 284, 288; *Sharp v. Zeller,* 114 La. 549, 38 So. 449; *Parten v. First Nat'l Bk.,* 204 Minn. 200, 283 N.W. 408, 412; *Simons v. Munch,* 127 Minn. 266, 149 N.W. 204; *Sharp v. McColm,* 79 Kans. 772, 101 P. 659, 662; *Stalick v. Wilson.* 21 N.M. 320, 154 P. 708, 709; *Wood v. Ross,* 85 S.C. 309, 67 S.E. 449, 452, bot. col. 2; *Gough v. Jones,* 212 S.W. 943, 944, bot. col. 2 (Tex. Com'n of Appeals); *Texas Co. v. Beall,* 3 S.W.2d 524 (Tex. Civ. App.); *Keton v. Clark,* 67 S.W.2d 437, 439 (Tex. Civ. App.); *Gans etc. Co. v. Stanford,* 91 Mont. 512, 8 P.2d 808, 811, col. 2; *Farmers etc. v. County Court,* 105 W.Va. 567, 143 S.E. 347.

of subdivision R of the Plan and says that "the extracts from the Commission's reports clearly provide for a reduction in the Credit Corporation's **claim** by the amount of such proceeds." This is accurate. We never argued that we were not required to reduce our "claim"; we never suggested we were entitled to double payment. But all that was required by the Plan was reduction of our "claim."

The Committee's Brief (p. 12) states that the Credit Corporation's claim was dealt with as a unit. How else could it have been dealt with? But the Credit Corporation's **security** was **not** dealt with as a unit. The Plan, in the light of the decision of the Supreme Court, makes it clear that sharp distinction was made between (1) the general and refunding mortgage bonds, (2) the Debtor's distributive share under the Marshaling and Distributing Plan, 1931, and (3) the accommodation collateral. Later (p. 15) it is said that the new securities allotted to us could not have been allotted "in payment of part only" of our claim. This is just playing with words. The securities here were not allotted in payment of part of the claim, but they were allotted as only part payment of the whole claim. The new securities were allotted **"in respect of"** our claim, the allocation being made upon the basis of security in the form of general and refunding mortgage bonds held. The new securities were **not** issued "in **payment** of" our claim.

It is said (p. 12) that there was "no finding that the Credit Corporation's claim was not fully secured by the Debtor's collateral held by it." We may add that there was no finding that it **was** fully secured. If the Committee's Brief, by this statement, means there was no finding in so many words the statement is accurate. But if it means that there was no finding of the **fact** that demonstrated that the Credit Corporation's claim was not fully secured by the Debtor's collateral, the statement is inaccurate. The fact was found as we showed in our Opening Brief (pp. 17, 18). Indeed, the Committee's Brief (p. 15) grudgingly concedes this, throwing out the suggestion that the finding "may

have been factually erroneous." But as the brief itself states (p. 15) "whether or not factually erroneous, the conclusion of the Commission * * * is now *res adjudicata* and not open to question on this appeal."

What has just been said disposes of the suggestion at page 14 of the Committee's Brief that there was no finding of the value of the general and refunding mortgage bonds. There was no finding in terms as to the value, but there was the finding of a fact, from which it necessarily follows that the value of those bonds could not exceed 359.3367 per 1,000 of principal and interest (Op. Br. 17).

It is suggested that in subdivision P(4), an allocation of common stock was made to the Credit Corporation at $62 per share and that this is the value of that stock for the purposes of the Plan. This has been fully dealt with in our Opening Brief and Reply Brief. In this connection one new suggestion is made. It is said that the Supreme Court spelled out a determination of total value of the Debtor's system from the "total and **assumed** value of the security authorized by the Plan" of $84,000,000; that deducting from this trustees' certificates, equipment obligations and first mortgage bonds, principal and interest $75,000,000 plus, the remainder of $9,000,000 would approximate the value of the assets subject to the lien of the general and refunding mortgage bonds and such assets as were not subject to any lien (Com. Br. 14, 15). The impropriety of proceeding on this line of reasoning is obvious. But, assuming that it is not, what is the result? There was outstanding $18,999,500 principal amount of general and refunding mortgage bonds. On this line of reasoning those bonds would be worth less than 500 per 1,000 of principal of bonds and the value of the security which the Credit Corporation held (the only thing against which new securities were allotted) for its claim of $2,590,924.11 would be less than $2,000,000. This without more demonstrates that the claim of the Credit Corporation was unsecured to the extent of over $590,924.11.

The Committee's Brief says that the Firsts were paid in full and that the junior security holders were entitled to receive nothing until the Firsts were fully paid. Assuming that the Firsts were paid in full,—it is not the fact (see particularly Rep. Br. 46),—this would have no tendency to show that the junior security holders were or were not paid in full. And it is not true that the "junior" security holders were entitled to nothing until the Firsts were paid in full. The junior security holders were junior only as to certain assets. **As to other assets, they had a first lien.** It is unnecessary to repeat the material in our Reply Brief at pages 17-23.

At one or two places, the Committee's Brief says that the Credit Corporation's claim was fully secured and fully paid. At other places it is more cautious and says that "the plan provided for **refunding** in full the claim of the Credit Corporation by issue to it" of new securities. Our Reply Brief sufficiently deals with any claim that we were "made whole",—were paid in full. If, by saying that our claim was "refunded," it is meant that we were made whole in fact, the statement is subject to all of the defects of the claim of The Western Pacific Railroad Corporation. If by "refunded" is meant only that all of the Debtor's securities we held were called in and new securities of the Debtor substituted, and that by force of the statute, as between the Credit Corporation and the Debtor, the receipt of these new securities provided the Debtor with a personal defense to any claim against the Debtor by the Credit Corporation (see Rep. Br. p. 29, et seq.) the statement is accurate but meaningless. It advances us nowhere. It has no tendency to demonstrate that under subdivisions P and R of the Plan, beyond reduction of our "claim" by the amount of the Debtor's distributive share under the Marshaling and Distributing Plan, 1931, there was worked a reduction in the amount of the new securities issuable to us under the Plan.

It is said (p. 18) that the new securities issuable to the Credit Corporation could not possibly have been allocated "in payment

of only $1,437,346 of the Credit Corporation's claim"; that this would result in issuing the common stock to the Credit Corporation at $29.40 per share. But the stock was not issued in payment of the claims or part of any claim. It was allocated "in respect of" the total amount of the claims secured by general and refunding mortgage bonds, the allocation of the new securities being made among the creditors upon the basis, not of their claims, but of the security held by them. The Commission found, as a fact, that the general and refunding mortgage bonds could not have a value which would make those held by the Railroad Credit Corporation of a value of more than $1,437,346. If the Committee's Brief would state the facts, and not make assumptions contradicted by the Plan, it would not become involved in the circles of its own reasoning.

Finally, with becoming apathy, it is said that the court's construction of the Plan, complained of on this appeal, is not open to review by this Court (p. 20). The Reorganization Committee does not go as far as the Western Pacific Railroad Corporation. It does not argue that the District Court acted only as an arbitrator. The point attempted is that The Railroad Credit Corporation, by favorable action on the Plan, as contemplated by §77 of the Bankruptcy Act, "in effect stipulated that no appeal would be taken from the District Court's construction order." The Committee's suggestion is to be approached with some settled rules in mind.

Waiver of a right of appeal is not readily to be implied (*Embry v. Palmer,* 107 U.S. 3, 8, 27 L.ed. 346, 348, quoted in *Gilfillan v. McKee,* 159 U.S. 303, 40 L.ed. 161; *Kane v. Roxy Theatres Corp.,* 63 F.2d 754 (C.C.A. 2,—cert. den. 289 U.S. 751, 77 L.ed. 1496); *Haschenberger v. Dennis,* 118 Neb. 411, 225 N.W. 25, 63 A.L.R. 493). "The right of appeal is always favored. It may be waived by contract, but such contract must be in writing, based upon a sufficient consideration, and filed in the case." (*Wishek v. Hammond,* 10 N.D. 72, 84 N.W. 587, 588) "The right of appeal is favored in law, and it will not

be held to have been waived except upon clear and decisive grounds." (*Hixon v. Oneida County,* 82 Wis. 515, 52 N.W. 445, 449; *Moore v. Moore,* 81 Ind.App. 169, 135 N.E. 362, 364. See also *Holmes v. District Co.,* 58 Nev. 352, 80 P.2d 907, 117 A.L.R. 1382[6]) This Court has taken occasion to say that "the evidence of a waiver of a right to appeal must be clear and decisive." (*Woodward v. McConnoughey,* 106 F. 758 (C.C.A. 9)[7])

The Committee's Brief (p. 20) states, as we stated (Rep. Br. 53, 54), that it was anticipated that controversies might arise as to the proper construction of the Plan; that, for this reason, subdivision V was inserted in the Plan; that the purpose of subdivision V was to permit "the District Court to make a final and conclusive construction of any questioned provision of the Plan, **to the extent that the Commission itself might have made a final and conclusive determination as to the proper construction."** If this means what it says, we would agree to it. Once the Plan had been confirmed by the court, the court's order had become final, and the Plan had been submitted to and approved by the creditors entitled to vote on it, it was no longer open to change or modification. Any question of its meaning,—of its proper construction,—would be beyond the power of the Commission. Any such question would present only a question of law resolvable by a court. As to these questions, the Commission itself could not make a final and conclusive determination. The Commission cannot make any conclusive determinations as to questions of law.[8]

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6. The court says that "appeals as a rule are favored and not to be defeated by strained construction."

7. Upon the general proposition the following cases may also be consulted: *Ball v. Wright,* 115 Ga. 729, 42 S.E. 32; *Brown v. Galesburg etc. Co.,* 132 Ill. 648, 24 N.E. 522; *In re Abel,* 147 Wis. 467, 133 N.W. 585.

8. The Commission recognized the limits of its jurisdiction in the very matter of the reorganization of The Western Pacific Railroad Company (see I-R 262). And cf. *Brown & Sons L. Co. v. Louisville & N. R. Co.,* 299 U.S. 393, 81 L.ed. 301 (the construction of a railroad tariff is a matter of law like the construction of any other document and construction by the Commission is not conclusive where no administrative question is involved); *Institutional Investors v. Chic. etc. P. Co.,* 318 U.S. 523, 569, 87 L.ed. 959, 1009; *I. C. C. v. Ry. Executives Ass'n,* 315 U.S. 373, 86 L.ed. 904; *Powell v. U. S.,* 300 U.S. 276, 81 L.ed. 643; *I. C. C. v. Louisville & N. R. Co.,* 227 U.S. 88, 57 L.ed. 431.

Subdivision V is the **Commission** speaking—these words are out of the Commission's mouth, not out of the mouths of the creditors. By subdivision V the Commission was doing no more than removing a possible question of the necessity of reference of minor matters back to it. So far as the court was acting under subdivision (f) of §77,—was making orders relative to putting into effect and carrying out the Plan,—and was performing a function in respect of which the Commission had no power or authority, the Commission was not attempting to speak. With such matters the Commission had nothing to do,—it had no occasion to concern itself. Its language must be read in the light of the condition of the case at the time that language was used and the Commission's words are to be restricted to the occasion and object of their use. Prior to the final confirmation of the Plan and favorable action by the Creditors, there was occasion for the Commission to make clear that reference back to it of minor matters and matters of construction was unnecessary. Under subdivision (e) of §77, after the plan has been certified by the Commission to the court, the court is to act upon it and "if the judge shall not approve the plan" he may dismiss the proceedings or, in his discretion, "refer the proceedings back to the Commission for further action." The Commission had in mind that this should not be necessary if there were incidental or subsidiary parts of the Plan which did not meet the approval of the judge, or if the judge should find that he could not approve it without a definite construction being placed upon certain of the provisions. To avoid disapproval on account of minor matters and to obviate reference back to the Commission on that account, subdivision V was put in the Plan. Again, it is provided in subdivision (e) of §77 that after approval of the plan it shall be submitted to the creditors and if not accepted by them "the judge may nevertheless confirm the plan if he is satisfied and finds, after a hearing, that it makes adequate provision for fair and equitable treatment for interests or claims of those rejecting it." But, if it does not, the judge need not con-

firm the plan and "if the judge shall not confirm the plan he shall * * * refer the case back to the Commission for further proceedings." Again, on submission of the plan to the creditors, some creditor might reject it upon a well-founded but minor ground, which the court could readily correct by giving to the plan an appropriate construction. The purpose of subdivision V was to permit this and to avoid unnecessary failure of confirmation and reference back to the Commission.

This is the sense and proper limitation of subdivision V; and it would not violate the purpose and object of the provision to go a step farther and say that it was also designed to remove any claim of the necessity of reference back to the Commission when the court was making orders and supervising execution of the Plan as contemplated by subdivision (f) of §77. But to go beyond this is to distort subdivision V and attempt to make it serve a purpose never intended.

If there is any question as to the meaning and construction of a judgment or decree, it is to be given that construction "which is consonant with the judgment that should have been rendered on the facts and law of the case" (p. 8 above). It is settled that the court rendering a judgment cannot by that judgment deprive a party to the proceeding before it of the right of appeal from that judgment; that any such provision of a judgment is void on its face (*U. S. v. Adams,* 6 Wall. 101, 18 L.ed. 796; *Bell v. U. S.,* 9 F.2d 820 (C.C.A. 9); *Huff v. Huff,* 73 W.Va. 330, 80 S.E. 846, 848, col. 2, 51 L.R.A.N.S. 282; *Bartlet v. Slater,* 211 Mass. 334, 97 N.E. 991. Cf. *Jacksonville etc. Corp. v. Dunlap Hotel Co.,* 350 Ill. 451, 183 N.E. 397). If possible, a court's judgment would be given a construction which would make it consonant with this rule and which would not impute to the court an intention to violate it. For all the more reason, when the Commission speaks, it is not to be assumed that its language is directed at forcing a party to a reorganization proceeding to forego a right which does not appertain to any action

of the Commission, but is a statutory right appended to action of the bankruptcy court.

The cases cited in the Committee's Brief do not support the point attempted. *U. S. Consolidated Seeded Raisin Co. v. Chadock & Co.,* 173 F. 577, held simply that a stipulation waiving right of appeal from a specific and contemplated determination of an issue then framed was valid. The stipulation was one made and filed in the very proceeding in which the question was raised, after the matter had been argued and submitted, and expressly waived the right of appeal from the judgment to be rendered on the known issue so submitted. *In re Patterson MacDonald Shipbuilding Co.,* 292 F. 700, held that a consent to refer to a master did not preclude the right of appeal where it provided he should act in the same manner as a referee in bankruptcy. *Hoste v. Dalton,* 137 Mich. 522, ~~800~~ 100 N.W. 750, held that the right of appeal was waived in these circumstances: An agreement made in settlement of a dispute provided that a question of value should be submitted to arbitration. A question was raised, but the contract provided that any controversy under the agreement should be submitted to the court and that its decision should be final. The agreement was entitled in the court and cause. It was held that the agreement was valid.

None of these cases hold that any such provision as that in the Plan, made in the circumstances in which subdivision V was inserted in the Plan, constituted a waiver of a right of appeal from determination of then unknown and unanticipated controveries, by the court acting not merely to confirm action of the Commission, but acting independently and as a court of bankruptcy in the exercise of powers conferred upon it by subdivision (f) of §77 and to be exercised by it without regard for or reference to the Interstate Commerce Commission. The Commission was not attempting to act on a matter with which it had no function or concern.

CONCLUSION

The Committee's Brief does not attempt to meet the matter presented. It ignores the language of the Plan. It makes no attempt to argue that the Plan, literally construed, requires more than reduction of our "claim" or requires reduction of the new securities allotted to The Railroad Credit Corporation because of retention by The Railroad Credit Corporation of the Debtor's distributive share under the Marshaling and Distributing Plan, 1931. It ignores the whole scheme of the Plan in general and in particular the basis of allotment of the new securities. It ignores the history of the precise provisions under consideration. It tacitly concedes that the three reasons suggested by the District Court in support of its order do not support the result.

It is respectfully submitted that the portions of the District Court's order of September 14, 1944, appealed from by The Railroad Credit Corporation, are erroneous and that the appeal of The Railroad Credit Corporation should be disposed of as suggested in its Opening Brief.

Dated at San Francisco, May 31, 1945.

ARTHUR B. DUNNE
Attorney for Appellant,
The Railroad Credit Corporation

EDWARD G. BUCKLAND,
WILLIAM J. KANE,
Of Counsel